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to him purely through the Sixth Amendment, and hence intended merely as a personal protection and not going to the constitution of the Court.¹⁴

The question of waiver in the case of a serious misdemeanor has never come before the Supreme Court of the United States, and the English cases never seem to have decided the point, though they contain some conflicting dicta.¹⁵ The cases in the States where the right of waiver of a jury of twelve was denied have been mostly cases of felonies,¹⁶ though the *ratio decidendi* is usually broad enough to cover either the case of felonies or misdemeanors. The great majority of the State cases where the question of *Dickinson v. U. S.*⁹ has actually arisen have decided that the waiver was valid¹⁷.

THE CONSTITUTIONALITY OF THE COMMODITIES CLAUSE OF THE HEPBURN ACT.

On September 10, 1908, the Circuit Court of the United States for the Eastern District of Pennsylvania, in *United States v. The Coal Roads*, decided, that the Commodities Clause of the Hepburn Act was invalid, because "in the opinion of this Court, the enactment in question is not a regulation of commerce within the proper meaning of those words as used in the Commerce Clause of the Constitution, and therefore not within the power granted by that clause;" and secondly, because it violated the Fifth Amendment. A comparison of this case

¹⁴ In *Teenan v. Oklahoma*, 190 U. S. 343 (murder), the Supreme Court held that the right to object to the disqualification of a juror discovered after the taking of evidence had begun may be waived. But see *Hill v. People*, (*supra*), (murder), contra.

¹⁵ Cf. Forsyth's History of Trial by Jury, 241; Lord Dacre's Case, Kelyng's Reports, 56.

¹⁶ *Hill v. People*, (*supra*); *Wilson v. St.*, 16 Ark. 601; *St. v. Mansfield*, (*supra*). See also Cooley's Constitutional Limitations (7th ed.), page 458 and cases cited in note 1 on that page.

¹⁷ *Comm. v. Dailey*, 12 Cush. 80 (per Shaw, C. J.); *C. v. Sweet*, 16 Pa. C. C. 198; 4 Dist. 136 (false pretences); *St. v. Borowski*, 11 Nev. 119 (misdemeanor in office); *St. v. Cox*, 8 Ark. 436 (assault and battery); *Murphy v. Comm.*, 1 Metc. (Ky.) 365 (betting at an election). The defendant was fined \$100 and the court adverts to the petty character of the offense in arriving at their decision.

with the Northern Securities¹ decision is very interesting. In each there was a corporation owning two properties—in one, a controlling interest in the shares of two competing railroads; in the other, a railroad and a coal property. The wrong to be prevented in one was restraint of trade; in the other, discrimination. In neither, did duality of ownership of *necessity*, nor *actually*, but only *possibly* cause the wrong to be prevented. In both duality of ownership was authorized by State law. In the Coal Roads case the Court said, that the Commodities Clause forced upon the Coal Roads the alternative of either selling, or of retaining and not using. In the Northern Securities case, not even the benefit of such an alternative was given. At common law there is no right to make a contract in restraint of trade, nor to enter into a combination for that purpose. Nor is there any right at common law for a common carrier to discriminate.—A private carrier, whether a “farmer” or a corporation, is under no duty at common law to treat all alike; and any law compelling either so to do would interfere with the right of contract.—To deny the right to do either, viz., to cause a restraint of trade or to discriminate, is merely re-enforcing the common law; and is not in violation of the Fifth Amendment. Every such enactment, of necessity, is bound to cause some indirect loss.

The power of Congress under the Commerce Clause to enact the Commodities Act was denied on the ground that it amounted to a prohibition; and that the power to regulate did not include the power to prohibit. To determine whether there was, in fact, a prohibition, it is necessary to consider the substance and not the form; to consider the actual state of affairs, in order to see if transportation was, in fact, prohibited. In contemplation of law a corporation is an entity, distinct and apart from its members. Actually, the stockholders are the corporation, and the co-owners of the two properties in both of the two cases in question. A group of men, owning two properties, associated in corporate form in order to embark and operate them in one business enterprise. In the Northern Securities case, it was held that to do this, made restraint of trade a possibility; in the Coal Roads case, it made discrimination a possibility. In neither case were the stockholders actually compelled to sell either one of their properties. By neither act were they prevented from operating both of their properties separately. All that was prohibited by either statute was the continuing to

¹ 193 U. S. 359 (1903).

operate the two properties together. Duality of operation, not of ownership, was forbidden. Viewed in the above light, it can hardly be said, that the Coal Roads were forced either to sell, or to retain and not use. "All that is necessary is to distribute to the stockholders *pro rata* the shares of a new corporation, formed to take over the mining and manufacturing business of the corporation."² The decrease in the value of the shares in the old corporation would be commensurate to the value of the shares in the new. The only loss incurred would be due to the inability to continue to operate the two properties together—certainly, an indirect taking of property. Corporate organization would require a formal alienation from the old corporation to the new. But to contend that there was an actual sale, or even an actual alienation from one group of men to another, would be impossible. If the actual state of affairs is taken, it is hard to see that there was any prohibition of the transportation of any commodity; and it is unnecessary to decide whether such is within the power of the Commerce Clause. The power to prevent discrimination and restraints upon trade has never been questioned. If the power to regulate commerce includes the power to prevent possible restraints upon trade, there is no reason why it should not include the power to prevent possible discriminations.

But it must not be overlooked, that the so-called duality of ownership was subsequent to the enactment of the Anti-Trust Act in the Northern Securities case, while it was prior to the enactment of the Hepburn Act in the Coal Roads case. This affects the question of "due process of law." It must also be remembered, that in the former case the rights of no third parties, who owned shares in corporations in which the offending company was "indirectly" interested by a like ownership of shares in the same corporation, were affected. It may prove to be a defect in the drafting of the Hepburn Act that such rights of third parties may be jeopardized.

² See article by Dr. William Draper Lewis—"Constitutional Questions Involved in the Commodity Clause of the Hepburn Act"—in the Harvard Law Review, Vol. XXI (1908), page 595, at page 613.